

ETHICS IN GOVERNMENT ACT PUBLIC ACCESS ISSUES

12th Annual Govt. Ethics Conf. King of Prussia, PA (03/11/03)

(prepared by Bill Gressman, OGE, Tel.: 202-208-8000, ext. 1110)

Public Access to SF 278 Reports under the Ethics Act:

M The Standard Form (SF) 278 Executive Branch Personnel Public Financial Disclosure Reports are to be made available for public inspection and copying within 30 days of filing with an agency. See section 105(b)(1) of the Ethics in Government Act of 1978 (5 U.S.C. appendix) and OGE's executive branchwide access provision thereunder at 5 C.F.R. § 2634.603. The OGE Form 201 is the branchwide form used to request access under the Ethics Act.

M Public access is governed by the special procedures of section 105 of the Ethics Act, *not* the regular access procedures of the Freedom of Information Act (FOIA) (5 U.S.C. § 552). See *Church of Scientology v. IRS*, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993), *appeal dismissed per stipulation*, No. 93-8431 (5th Cir. Oct. 21, 1993) (SF 278s available only under the special access procedures of the Ethics Act; otherwise, FOIA exemption (b)(3)(A) applies — for information exempted from disclosure by a statute that leaves no discretion on the issue if the Ethics Act disclosure requirements are not met).

M Alternate “displacement” theory not yet litigated (judicial review would then be on Administrative Procedure Act arbitrary/capricious standard basis, rather than FOIA *de novo* basis).

M Note different information required, prohibited uses, etc. — see below and the OGE Form 201 access form.

M Some agencies have a procedure to notify filers when their SF 278 reports are requested (access requests are in turn publicly available via a 201). Such notification is optional, not required by the Ethics Act or OGE's branchwide regulations. OGE itself generally does not provide notification of requests.

Information Required For Ethics Act (§ 105(b)) Access:

M Written application (the OGE Form 201 or equivalent agency form) providing applicant's name, address, office telephone no., occupation, applicant type and signature, the name & address of any other person/organization, if any, on whose behalf access to the material is sought, an indication of an awareness of the prohibitions on obtaining or using SF 278 reports (prohibited uses) as well as a specification of the material (SF 278s or other covered records) copies (or inspection) of which are requested. See section 105(b)(2) & (c)(1) of the Ethics Act and 5 C.F.R. § 2634.603(c)(1)-(c)(3) & (f).

Prohibited Uses of SF 278 Reports (Notice on OGE Form 201):

- ❶ For any unlawful purpose.
- ❷ For any commercial purpose, other than by news and communications media for dissemination to the general public.
- ❸ For determining or establishing the credit rating of any individual.
- ❹ For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

M *Penalty for misuse:* civil monetary penalty, assessable in a Federal district court action by the Civil Division of the Department of Justice (DOJ), in an amount now (as of 09/29/99) of up to \$11,000 under section 105(c)(2) of the Ethics Act, as adjusted in 5 C.F.R. § 2634.703 of OGE's regulations (see 64 Fed. Reg. 47095-47097 (08/30/99)) and 28 C.F.R. part 85 (§ 85.3(a)(4) in particular) of DOJ's regulations (see 64 Fed. Reg. 47099-47104 (08/30/99)).

"Other Covered Records" Subject to Ethics Act Access Procedures (see Part III of Oct. 1999 edition of OGE Form 201 for the first four):

❶ Certificates of divestiture (see 5 C.F.R. § 2634.1004 + OGE informal advisory memo 99x9).

❷ 18 U.S.C. § 208(b)(1) & (b)(3) waiver (exemption) determinations, hybrid procedure subject to FOIA/statutory deletions (see 18 U.S.C. § 208(d)(1) and 5 C.F.R. § 2640.304 + OGE informal advisory letter 93x34).

❸ Publicly available qualified trust materials (see section 102(f)(5)(D) & (f)(7)(B) of the Ethics Act, plus 5 C.F.R. §§ 2634.408(a) & (d) and 2634.603(g)(2) and appendixes A, B & C to part 2634): (i) trust instruments (except testamentary disposition provisions); (ii) list of assets transferred to trust (& assets sold if blind trust); (iii) report & list of assets at trust dissolution; and (iv) certificates of independence & compliance.

❹ Other OGE Form 201 access forms (see section 105(b)(2) of the Ethics Act and 5 C.F.R. § 2634.603(d)).

❺ OGE-approved gifts reporting waiver request cover letters — the "wedding gifts" exclusion (not mentioned on the 1999 form, will be on new one; see section 102(a)(2)(C) of the Ethics Act and 5 C.F.R. § 2634.304(f)(2)).

❻ OGE-approved public reporting waiver request cover letters — for certain <130-day SGEs (not mentioned on the 1999 form, will be on new Dec. 2002 form; see section 101(i) of the Ethics Act and 5 C.F.R. § 2634.205(b)(4)).

M OGE itself also allows a requester to use an OGE Form 201 to initiate a request, that is processed under the Freedom of Information Act, for

copies of OGE transmittal letters to concerned Senate committees for signed, public SF 278 reports of Presidentially appointed, Senate-confirmed (PAS) executive branch nominees (+ enclosures, including ethics agreements), with redaction of any FOIA-exempt information. For a discussion of various issues concerning nominee ethics agreements (including public disclosure), see OGE DAEOgram DO-01-013 (03/28/01) & OGE informal advisory memo 88x13 (part II) (09/12/88).

Retention Periods:

M General six-year retention period (& public availability) for SF 278s (but one year for unsuccessful nominees/candidates) & OGE Form 201s, then destroyed unless further needed in an ongoing investigation.

M Per section 105(d) of Ethics Act, OGE's regulations at 5 C.F.R. § 2634.603(d) & (g), the OGE/GOVT-1 Privacy Act executive branchwide system of records, and item 2.a. of the new Ethics Program Records General Records Schedule (GRS) 25 (previously in item 24.a. of GRS 1/Civ.Pers. Recs.).

Fees Chargeable:

M For actual direct cost of reproduction and mailing of SF 278 reports, if any agency so provides by its own regulation (see section 105(b)(1) of the Ethics Act and 5 C.F.R. § 2634.603(e) of OGE's executive branch regulations).

M See OGE's own internal SF 278 duplication fee rules at subpart G of its FOIA & Ethics Act fees regulation at 5 C.F.R. part 2604 that provide for a charge of 3¢ a page plus mailing cost, subject to a de minimis exclusion of \$10.00 or less (= 333 pages free of charge, if no mailing fee); not a branchwide regulation.

Other Requests/Demands for Access:

M Various Federal investigative agencies, the Congress, courts, other government units and private parties can make documentary requests or serve subpoenas on agencies for SF 278s as well as other ethics records.

M If the person or forum seeking or demanding official records or testimony has jurisdiction over the agency concerned (issues can differ in Federal v. State court/admin. proceedings -- sovereign immunity & Supremacy Clause as to State proceedings), most of the FOIA exemptions would not apply;

the provisions of the Privacy Act (5 U.S.C. § 552a) would apply to any information contained in a "system of records." See routine uses a. & b. of the OGE/GOVT-1 records system for Ethics Act public access to SF 278s and section 208(b) waiver determinations (as to waivers, see OGE 93x34 for a discussion of disclosure versus nondisclosure issues regarding confidential OGE Form 450 reports) and, for other specific disclosures, routine uses c.-h.

M If the Privacy Act (PA) applies to requested/subpoenaed materials, the exceptions to the general disclosure prohibition (absent written permission of the individual concerned) could allow various releases/governmental uses of records, even without an Ethics Act access request (OGE Form 201), but not with a subpoena alone. See *Doe v. DiGenova*, 779 F.2d 74, 77-85 (D.C. Cir. 1985) & *Doe v. Stephens*, 851 F.2d 1457, 1465-1467 (D.C. Cir. 1988) — need a (judge-issued) order of court of competent jurisdiction (exception (b)(11)), authorized written investigatory demand (exception (b)(7)) or another Privacy Act basis for release, but not an exception (b)(3) routine use (insufficient for subpoena release); plus, *note* PA exception (b)(2) for required FOIA disclosure.

M Other authority must be consulted to determine if agency must/should divulge information; also, various governmental litigation privileges (such as that for the deliberative process) may apply, particularly as to demands by private litigants (not usually asserted as to investigatory agency or Congressional demands); plus, *note* agency *Touhy* procedural regulations (OGE's internal rules are codified at 5 C.F.R. pt.2608; see proposed & final rules published at 66 FR 48824-48828(09/24/01) & 67 FR 35707-35713(05/21/02)).

Forms:

M The SF 278, the OGE Form 201 and the access customer survey are OMB-cleared paperwork forms; the first two have a Privacy Act notice (the survey is anonymous).

❶ *SF 278 Executive Branch Personnel Public Financial Disclosure Report* (03/2000 edition, cleared through 06/30/2003, control # 3209-0001).

❷ *OGE Form 201 Request to Inspect or Receive Copies of SF 278s ... or Other Covered Records* (Dec. 2002 edition, cleared through 12/31/2005, control # 3209-0002); optional branchwide form — agencies may develop their own access forms provided all needed Ethics Act information is included.

❸ *Public Financial Disclosure Access Customer Service Survey* (OGE-only form) (03/02 edition, cleared through 03/31/2005, control # 3209-0009).

PANEL ON SF 278 & RELATED RECORDS
PUBLIC ACCESS ISSUES
12th Annual Government Ethics Conference
King of Prussia, PA

9:45–11:00 a.m. Tuesday, March 11, 2003

Presenters: William E. Gressman, Senior Associate General Counsel (Administrative Law), Office of Government Ethics (OGE), Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917 (Tel.: 202-208-8000, ext. 1110; FAX: 202-208-8037); Judith F. Means, Senior Counsel, Office of the General Counsel, Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230 (Tel.: 202-482-0387; FAX: 202-482-2552); and Elaine Newton, Attorney Advisor, OGE (Tel.: 202-208-8000, ext. 1137; FAX: 202-208-8037).

Arrival & Introduction (9:45–9:50 a.m.)

Presentations (9:50–11:00 a.m.)

- M Ethics in Government Act Public Access Issues (Mr. Gressman)
- M Freedom of Information Act & Privacy Act Issues (Ms. Means)
- M Application of All Three Laws to SF 278 File Documents (Ms. Newton)

Summary: In this session, the panelists will explain how copies of SF 278 Public Financial Disclosure Reports and other covered records are made available to public requesters in accordance with the special access procedures of the Ethics in Government Act and the Office of Government Ethics executive branch regulations. The panelists will also address the handling of the other materials in the SF 278 report files, including Privacy Act coverage and access requests under the Freedom of Information Act. In addition, the session will present OGE's proposed revised executive branchwide Privacy Act system of records for SF 278s and other name-retrieved ethics program records (OGE/GOVT-1) as well as briefly note the new General Records Schedule 25 for Ethics Program Records, including SF 278s.

Attendees' questions and comments are welcome throughout the presentations.